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IN THE

Supreme Court of the United States

PHILLIP MULDER, GLENN HILTON, CHARLES BUCK, LEON GIBBONS, REBECCA MCREYNOLDS and BARBARA KIPP,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the N th Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

THE OPPONENTS NEITHER DISPUTE THE IMPORTANCE OF THE ISSUE PRESENTED NOR JUSTIFY THE REFUSAL OF THE NLRB AND *EN BANC* NINTH CIRCUIT TO FOLLOW *ELLIS* AND *BECK*.

A) The issue and its importance. "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *accord Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992). This Court's decisions in *Ellis v. BRAC*, 466 U.S. 435 (1984), and

CWA v. Beck, 487 U.S. 735 (1988), thus constitute an authoritative construction of the Railway Labor Act ("RLA") and National Labor Relations Act ("NLRA") concerning the issue presented: whether objecting nonmembers paying compulsory dues can be forced to subsidize any union organizing activities.

To avoid the clear meaning of *Ellis* and *Beck* and the "statutory equivalen[ce]" of the sections of the RLA and NLRA that authorize compulsory dues, *Beck*, 487 U.S. at 762, the NLRB's Brief in Opposition ("NLRB Opp.") at 10-16 contorts the two statutes and this Court's precedents interpreting them, as does the union's Brief in Opposition ("UFCW Opp.") at 5-11.[1] The original Ninth Circuit panel recognized the flaws in this approach, holding that "the Board does not have a free hand to interpret a statute when the Supreme Court has already interpreted the statute," and "does not have the power to reverse the Supreme Court." App. E at 35a-37a.

The NLRB's Brief admits that this Court has "held that the chargeability test established in its RLA precedents—whether the union activity at issue is 'germane to collective bargaining,

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[1] The NLRB purports to rely upon *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). NLRB Opp. at 16; App. F at 52a n.19. However, the NLRB applies only the first part of *Lehnert's* three-part chargeability test, "germaneness." The Board ignores the other two parts, *i.e.*, that the expenses involved must serve the government's interest in labor peace and not significantly add to the burden on nonmembers' free speech interests. *Lehnert*, 500 U.S. at 519. Courts have held that charging nonmembers for organizing can never meet the latter two prongs of the *Lehnert* test. *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. App. 1992), *aff'd sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992); *Browne v. Wisconsin Employment Rel. Comm'n*, 485 N.W.2d 376, 388-89 (Wis. 1992). Indeed, *Ellis* effectively held that organizing cannot meet *Lehnert*'s third prong when it recognized that any "free-rider problem" in the organizing context "is roughly comparable to that resulting from union contributions to pro-labor political candidates." 466 U.S. at 453.

contract administration, and grievance adjustment'—is . . . 'controlling' under the NLRA." NLRB Opp. at 14; *see also Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1113 (7th Cir. 1996) ("The germaneness guidance offered by the Court in *Ellis* has also been applied in private sector NLRA cases."). Yet the NLRB, with the blessing of the *en banc* Ninth Circuit, persists in misapplying and undermining the application of that test to organizing expenditures under the NLRA.

But, while the opposition briefs resist the application of *Ellis* and *Beck* to this case, they do not dispute the importance or timeliness of the issue presented. Nor can they. Indeed, when asking for rehearing *en banc*, the NLRB argued that "the case involves a question of exceptional importance: namely, whether the NLRA prohibits a union from charging objecting non-members . . . the cost of organizing employees of their employer's competitors." NLRB Petition for Rehearing *en banc* at 1, *UFCW Local 1036 v. NLRB*, 265 F.3d 1079 (9th Cir. 2001).[2]

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[2] The NLRB's Brief in Opposition at 6 n.3 implies that a writ need not be granted now, because there exists "[a] case currently pending before the Board present[ing] the organizing-expenses issue," and "[t]wo of the three current members of the Board have not yet had an opportunity to express their views on the issue . . . ." This is not grounds to deny the Petition.

First, the NLRB has on several occasions faced this or analogous issues, and has divided in every case. *See Teamsters Local 443 (Connecticut Limousine Serv.)*, 324 N.L.R.B. 633, 638 (1997) (Chairman Gould, dissenting) (accusing his colleagues of "manufactur[ing] a distinction in applicable law where none exists"); *Teamsters Local 75 (Schreiber Foods)*, 329 N.L.R.B. 28, 39-40 (1999) (Member Brame, dissenting); *California Saw & Knife Works*, 320 N.L.R.B. 224, 226 n.19, 239 n.78 (1995) (Member Cohen, dissenting); *Meijer, Inc.*, 329 N.L.R.B. 730, 744-46 (1999) (App. F. at 84-90) (Member Brame, dissenting). The Board does not need additional opportunities to belabor an issue that already was decided in *Ellis* and *Beck*.

Second, by arguing that the decision of the *en banc* Ninth Circuit is "correct," NLRB Opp. at 8, the two current NLRB members already have

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The importance and timeliness of the issue also is demonstrated by events. A recent AFL-CIO convention unanimously passed a resolution calling on constituent unions to devote 30% of their budgets to organizing. AFL-CIO President Sweeney said "many unions already are on track to meet or exceed the 30 percent commitment." *Union Organizing: AFL-CIO Convention Recommits Labor*, Daily Lab. Rep. (BNA) (Dec. 11, 2001); *see AFL-CIO to Hold National Organizing Summit Next Year*, Daily Lab. Rep. (BNA) (Aug. 8, 2002); NAM & ABC Amicus Curiae Brief in Support of Petitioners at 8-10.

Nor do the briefs in opposition dispute the fact that this Court has already issued a writ, albeit under a different (but "equivalent") statute, on the precise issue presented here. *Ellis*, 466 U.S. at 441, 452 n.13 (1984); *see also Beck*, 487 U.S. at 741-42, 762 (granting "certiorari to resolve the important question"). This Court issued the writ in *Ellis* because it recognized that forcing nonmembers to pay for union organizing is an important matter touching on both federal labor policy and employees' rights of free speech and association. Having issued a writ under the RLA in *Ellis*, it is even more compelling that a writ be issued in a case arising under the NLRA, "its statutory equivalent," *Beck*, 487 U.S. at 762, which covers millions more employees.

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[2](...continued)
expressed their views. Nor has the NLRB asked that *this* case be remanded for reconsideration by those two members.

Third, unlike the other case pending before the Board, the present case contains "'abundant evidence' developed in the administrative record," NLRB Opp. at 4-5. Thus, this case is a better vehicle for the Board to defend its view that *Ellis* and *Beck* can be distinguished based upon the "'persuasive' record evidence" allegedly present here, *id.*

B) The opponents misstate the record in *Ellis* and this Court's holding, in their efforts to distinguish the issue presented. In calling this a "case of first impression," NLRB Opp. at 8; *see* UFCW Opp. at 2, the NLRB and the UFCW unions misstate the record and holding in *Ellis*.

The NLRB claims that *Ellis*' holding was limited to "general" organizing efforts, while the issue here is whether the NLRB "may craft a narrower rule that permits objecting nonmembers . . . to be charged for organizing efforts directed at employers in the same competitive market." NLRB Opp. at 3. This sophistic argument ignores that the allegedly "narrow" issue of organizing within the "competitive" industry was addressed in *Ellis* at every level, leading this Court to hold that ***all*** organizing—"general" and in the competitive industry—is nonchargeable. 466 U.S. at 451-53.

In *Ellis*, the union charged nonmembers for organizing and recruiting new members ***both*** inside and outside Western Airlines' competitive markets. The organizing efforts that the nonmembers challenged in *Ellis* were directed to:

> (a) employees [in the air transportation industry but] not employed by Western Airlines; (b) employees not employed in the air transportation industry; (c) employees not employed in other transportation industries.

Ellis v. BRAC, 91 L.R.R.M. (BNA) 2339, 2342, 1976 WL 1479, at *4 (S.D. Cal. 1976). The district court ruled that none of these expenditures was chargeable. *Id.* at 2343, 1976 WL 1479, at *5, *incorporated*, 108 L.R.R.M. (BNA) 2648, 1980 WL 2071 (S.D. Cal. 1980).

In reversing, the Ninth Circuit specifically found that BRAC's efforts to organize "***an*** industry" [*i.e.*, the competitive air transportation industry in which Western Airlines operated]

benefits employees and units already organized." *Ellis v. BRAC*, 685 F.2d 1065, 1074 (9th Cir. 1982) (emphasis added).

When *Ellis* reached this Court, BRAC relied upon the expert testimony of Lloyd Ulman, a noted labor economist, and Willard Wirtz, a former Secretary of Labor, to argue that organizing ***within the competitive industry*** was necessary to protect the already-organized workers.

> Former Secretary of Labor Willard Wirtz emphasized: . . . Organization is necessary also to protect the organized workers against the loss of work by subcontracting to unorganized employers [*i.e.*, competitors for the same work] . . . and against the loss of representation rights if their employer is taken over by a larger unorganized employer, as occurred with devastating consequences to BRAC members when the organized Capitol Airlines were merged into United Airlines.

BRAC Brief at 39-40, *Ellis*, S. Ct. No. 82-1150 (citing Wirtz's and Ulman's testimony), *reprinted in* BNA's Law Reprints, Lab. L. Series, Vol. 17, No. 9, 1983/84 Term at 205. Obviously, Western, Capitol, and United Airlines were in the same competitive market, yet *Ellis* found organizing of Western's competitors to be too "attenuated" from collective bargaining at Western to be chargeable to nonmembers. 466 U.S. at 451.[3]

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[3] UFCW Opp. at 10 misrepresents the history of the RLA and *Ellis* by claiming that *Ellis* declared organizing under the RLA nonchargeable solely because railroad union executive George Harrison "expressly disclaimed" that the union shop was needed to strengthen unions' organizing power, *Ellis*, 466 U.S. at 451 & n.12. This ignores that *Ellis* arose in the fledgling and sparsely organized air transportation industry, ***not*** the century-old and 85% unionized railroad industry. Thus, the highly unionized state of the nation's railroads was not the determinative factor in this Court's decision that all union organizing—even that conducted by BRAC at Western

(continued...)

That *Ellis* banned forced subsidization of all union organizing is corroborated by *Ellis*' explicit ruling that objecting nonmembers cannot even be charged for efforts "to recruit new union members within the bargaining unit." 466 U.S. at 452 n.13. This holding cannot be distinguished by speculating that "an unorganized worker has not had occasion to decide whether . . . he would choose nonmember objector status," NLRB Opp. at 13 n.4. A worker in an unorganized firm may well already have chosen nonmembership by voting against the union in an unsuccessful certification election. Moreover, new employees coming into an objector's unit also have not yet had occasion to decide whether to join or not, yet the union's costs of attempting to recruit them are nonchargeable under *Ellis*.

In short, this case raises the same issue that *Ellis* squarely and definitively decided. The *Ellis* Court's single use of the term "general organizing efforts," 466 U.S. at 440, on which the NLRB relies, NLRB Opp. at 3, was merely a short-hand phrase introducing the case. *Ellis*' holding, that ***all*** organizing has too attenuated a connection to the collective bargaining activities for which objecting nonmembers may be charged, *id.* at 451-53, encompasses the organizing at issue here.

C) The Circuit split is substantial. The opponents' attempt to deny a split between the *en banc* Fourth and Ninth Circuits, (NLRB Opp. at 15; UFCW Opp. at 6 n.2), is disingen-

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[3](...continued)
Airlines' competitors in the sparsely unionized airline industry—was "outside Congress' authorization," *id*, at 451. Rather, the critical factors were those that apply in ***any*** industry: that "[u]sing dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer," and that "[n]on-bargaining unit organizing is not directed at" "the employee the union [is] required to represent and from whom it [can]not withhold benefits." *Id.* at 452.

uous. *Compare Beck v. CWA*, 776 F.2d 1187, 1211-12 (1985), *aff'd en banc*, 800 F.2d 1280, 1282 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988) *with* App. A.

The Fourth Circuit panel in *Beck* noted that organizing was "the only specifically disallowed class of expenditures which CWA claimed to be erroneous in its exceptions to the special master's report." Then, based on *Ellis*, which it quoted at length, the panel held, "[w]e . . . affirm the decision of the district court in approving the special master's disallowance of CWA's expenditures under . . . four classifications . . ." including "'organizing,'" because those four categories are not chargeable as a matter of law. 776 F.2d at 1211. The NLRB's brief conveniently and tellingly fails even to cite the page of the *Beck* panel opinion on which this holding appears.

When the Fourth Circuit *en banc* reheard *Beck*, the *per curium* opinion stated that there was "no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved." 800 F.2d at 1282. Thus, the *en banc* Fourth Circuit clearly decided the organizing issue, and held *Ellis* binding under the NLRA, by adopting the majority panel's decision on this issue.

The real difference in the rulings of the *en banc* Fourth and Ninth Circuits is that the former chose to follow *Ellis*, whereas the latter refused, audaciously asserting that to do so would be an "overreading" of this Court's cases. App. A at 22a.

D) The NLRB is owed no deference on this issue, which has significant constitutional implications. The opposition pleads for deference to the NLRB's divided decision. NLRB Opp. at 9; UFCW Opp. at 1-4. No deference is owed where, as here, this Court has already authoritatively construed the statutory provision at issue. *Lechmere, Inc. v. NLRB*, 502 U.S.

527, 536-37 (1992); *see* pp. 1-2 *supra*. Moreover, last term the NLRB twice asked this Court for deference, but was rebuffed for another reason that applies here. *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002); *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390 (2002).[4]

In *Hoffman Plastic*, this Court applied the principle that it has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." 122 S. Ct. at 1280. In *BE & K*, the Court also gave the NLRB no deference, because of "the principle that we would not 'lightly impute to Congress an intent to invade . . . freedoms' protected by the Bill of Rights." 122 S. Ct. at 2396 (quoting *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961)); *cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Board's construction of the statute, as applied in this case, poses serious questions . . . under the First Amendment"). These principles, all but ignored by the *en banc* Ninth Circuit and the briefs in opposition, also govern here, because the Board's ruling trenches on First Amendment interests.

Union "organizing" activities, and refraining from those activities, are protected by the First Amendment's guarantees of free speech and association: "The right . . . to discuss, and inform people concerning, the advantages ***and disadvantages*** of unions and joining them is protected not only as part of free

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[4] The NLRB repeats the *en banc* Ninth Circuit's erroneous observation that Petitioners failed "'substantially to contest the Board's actual factfinding.'" NLRB Opp. at 7 (quoting App. A at 12a). The Nonmembers did challenge the factual underpinnings of the NLRB's ruling, relying in part on the expert testimony of Texas A&M Professor Morgan O. Reynolds that the relationship between the level of unionization and wage rates is "weak and tenuous." *See* Petitioners' Brief to the Ninth Cir. at 50-60.

speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (emphasis added); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-35 (1977) (First Amendment equally protects right to refrain from unionization).

Given the free speech and association interests in refraining from organizing activity, it is clear why *Ellis* found organizing costs to be "outside Congress' authorization": because any "free-rider problem" in this context "is roughly comparable to that resulting from union contributions to pro-labor political candidates." 466 U.S. at 451, 453. To rule otherwise would have meant that Congress ***intended*** RLA § 2, Eleventh to invade nonmembers' rights of free speech and association, by forcing them to subsidize an ideological message (unionism in general and a specific union's in particular) that they deplore. *See United States v. United Foods*, 533 U.S. 405 (2001) (agricultural producers cannot be compelled to fund even generic, non-ideological messages). Thus, grave constitutional questions are raised by the NLRB's ruling that objecting nonmembers can be compelled to subsidize union organizing and recruitment efforts. No deference is due the Board in these circumstances.

CONCLUSION

The Petition should be granted, and the decision below summarily reversed; or the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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